

**REMARKS**

Claims 1-49 were previously examined and claims 1-49 stand rejected. By virtue of this response, claims 1-14, 16-28, and 30-49 have been amended. Amendments are supported by claims as-filed, and no new matter has been added. Accordingly, claims 1-49 are currently under consideration. For the Examiner's convenience, Applicants' remarks are presented in the same order in which they were raised in the Office Action.

**Amendments to Specification**

Applicants have amended Paragraphs [0002], [0008], [0017], [0022], and [0039] to correct typographical errors and inconsistencies in dimensional units, e.g. kilobytes used in place of kilobytes per second. No new matter has been added by the amendments. Accordingly, Applicants request the amendments be accepted.

**Claim Objections**

Claims 1-14, 16-28, and 30-49 are objected to because of informalities outlined on page 2 of the Office Action. Applicants have amended the claims to correct the informalities. Accordingly, Applicants request the objections be withdrawn.

**Claim Rejections under 35 USC §112**

Claim 3 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention. Applicants have amended Claim 3 to eliminate the ambiguity associated with using "that ratio" in the claim language. Accordingly, Applicants request the rejection therefore be withdrawn.

**Claim Rejections under 35 USC §103**

A. Claims 1-5, 10-19, 24-29, 31-35, and 40-44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chmaytelli et al. (hereinafter Chmaytelli) (US Pub. No. 2002/0194325 A1) in view of Hamamoto et al. (hereinafter Hamamoto) (US Patent No. 6,622,151 B1).

Applicants respectfully traverse the rejection and submit that the Office Action fails to present a case of *prima facie* obviousness. Specifically, the proposed modification impermissibly changes the principle of operation in Chmaytelli, and Chmaytelli teaches away from implementing the modification. (MPEP §§ 2143.01, 2145.)

The modification proposed by the Examiner to meet the features of claim 13 renders Chmaytelli unsatisfactory for its intended purpose and impermissibly changes its principle of operation. (MPEP § 2143.01.) Chmaytelli discloses a method to provide an estimate of the data transfer rate based on “data transfer rates calculated closer in time to the downloading of the selected application program” so as to reflect the S/N ratio conditions at that time. (Chmaytelli at Paragraph 0069.) In averaging the historical data, Chmaytelli further emphasizes that “[t]here is a *distinct advantage* to weighting the data transfer rate over time.” (*Id.*)(emphasis added.) Accordingly, the principle of operation of Chmaytelli is the averaging of recent transfer rates to provide a download time estimate that captures “a more accurate ‘picture’ of the S/N ratio conditions unique to the wireless device.” (*Id.*).

Modifying the method in Chmaytelli to match download information between currently selected download and historical downloads would alter the principle of operation thereof. (MPEP § 2143.01.) For example, modifying the method of Chmaytelli to match by download transfer size, based on the method disclosed in Hamamoto, would impermissible change the principle of operation, i.e., to average historical data. For example, the modification would lead to data transfer rates selected, on average, from the middle of the time-ordered historical data. On the contrary, Chmaytelli emphasizes the importance of estimating the transfer rate based on data closest in time to an anticipated download. (*Id.* at Paragraph 0069.) Specifically, Chmaytelli states that “the data

transfer rates calculated later in time may be more accurate, and provide a better estimate of the time to download the selected application program.” (*Id.* at Paragraph 0076.) Moreover, selecting one download transfer rate based on a specific match would lead to errors associated with taking a single sample from a population instead of the population average. Chmaytelli emphasizes the need to average because “the data transfer rates for wireless devices are not constant and vary depending on different factors affecting the S/N ratio.” (*Id.* at Paragraph 0013.) Implementing the method disclosed in Hamamoto into the method described in Chmaytelli runs counter to the problem being addressed within the Chmaytelli reference.

In addition to impermissibly altering the principle of operation of Chmaytelli, Chmaytelli teaches away from implementing its disclosed systems and methods to estimate transfer rates on personal computers. (MPEP § 2145.) Chmaytelli states that the data transfer rate, determined by the modem speed, is constant for personal computers. (*Id.* at Paragraph 0012.) Chmaytelli further states that “there is no examination of the data transfer rates immediately preceding a download that might significantly affect the estimate” on personal computers. (*Id.*) The combined statements teach away from averaging the historical data transfer rates or to select a specific past data transfer rate, in light of Hamamoto or otherwise, in order to estimate the current transfer time on personal computers.

Accordingly, for at least the forgoing reasons, one of ordinary skill in the art would not modify the disclosure of Chmaytelli in light of Hamamoto to meet the features of claims 1-5, 10-19, 24-29, 31-35, and 40-44. Accordingly, the rejection should be withdrawn and claims 1-5, 10-19, 24-29, 31-35, and 40-44 allowed.

**B.** Claims 6-9, 20-23, and 36-39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chmaytelli et al. (hereinafter Chmaytelli) (US Pub. No. 2002/0194325 A1) in view of Hamamoto et al. (hereinafter Hamamoto) (US Patent No. 6,622,151 B1), and further in view of Nakamura (US Patent No. 6,751,795).

Nakamura fails to make the Claims 6-9, 20-23, and 36-39 *prima facie* obvious due to the deficiency of Chmaytelli in light of Hamamoto. Furthermore, the addition of Nakamura fails to cure the deficiency of Chmaytelli/Hamamoto. Therefore, Applicants submit that claims 6-9, 20-23, and 36-39 are allowable for at least the reason that each depends from an allowable independent claim. Accordingly, Applicants respectfully request reconsideration and allowance of claims 6-9, 20-23, and 36-39.

C. Claims 30, and 45-49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chmaytelli et al. (hereinafter Chmaytelli) (US Pub. No. 2002/0194325 A1) in view of Hamamoto et al. (hereinafter Hamamoto) (US Patent No. 6,622,151 B1), and further in view of Fredlund et al. (hereinafter Fredlund) (US Pub. No. 2003/0058457).

Fredlund fails to make the Claims 30, and 45-49 *prima facie* obvious due to the deficiency of Chmaytelli in light of Hamamoto. Furthermore, the addition of Fredlund fails to cure the deficiency of Chmaytelli/Hamamoto. Therefore, Applicants submit that claims 30, and 45-49 are allowable for at least the reason that each depends from an allowable independent claim. Accordingly, Applicants respectfully request reconsideration and allowance of claims 30, and 45-49.

**CONCLUSION**

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue. If it is determined that a telephone conference would expedite the prosecution of this application, the Examiner is invited to telephone the undersigned at the number given below.

In the event the U.S. Patent and Trademark office determines that an extension and/or other relief is required, applicant petitions for any required relief including extensions of time and authorizes the Commissioner to charge the cost of such petitions and/or other fees due in connection with the filing of this document to Deposit Account No. 03-1952 referencing docket no. 324212003200. However, the Commissioner is not authorized to charge the cost of the issue fee to the Deposit Account.

Dated: June 18, 2009

Respectfully submitted,

By Electronic Signature /Christopher B. Eide/  
Christopher B. Eide  
Registration No.: 48,375  
MORRISON & FOERSTER LLP  
755 Page Mill Road  
Palo Alto, California 94304-1018  
(650) 813-5720